BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Considering Assignments of Error 1, 2 and 3 set forth in petition the evidence referred to in the opinion of the Circuit Court of Appeals wherein it claims that the trial court should have admitted proffered custom evidence upon the issue of negligence with reference to the application and non-application of Rule 30 in its yards. Such evidence referred to and the ruling of the trial court thereon is as follows:

"Q. Now, Mr. McCarthy, in your interpretation of that rule 30 as superintendent will you state whether in your opinion it applies to switching movements?

Mr. Hanley: That is objected to and calling for——

JUDGE SCHWELLENBACH: I will sustain the objection.

MR. HAMBLEN: That, of course, raises the question we have discussed. May we approach the Bench? (Colloquy at the Bench)

MR. HAMBLEN: At this time, in view of the Court's ruling on this question we will offer to prove by Mr. McCarthy that, as superintendent, Rule 30 was interpreted not to apply to switching movements in the yards, and to further show that the rule applies only to thru train movements and to movements where the street is being approached, or if there is something unusual in the yards to which the engineer wishes to call attention. That this interpretation of the rule is general throughout the Union Pacific System, and that in none of the switch yards in the Union

Pacific System, including the old yard in the city of Spokane, has the rule ever been applied to require the ringing of the bell on switching movements. In addition to that offer of proof of the above by Mr. McCarthy I wish to offer the same proof by Mr. Rutherglen, who is the safety agent of the Union Pacific system in the Northwest, and also by Mr. Pidcock who is yardmaster for the Union Pacific System in the switching yards in Spokane, and also by each member of the train crew operating at the time of the accident under Mr. Owens. And, also the same evidence will be given by Mr. F. H. Lang, who is engine foreman of one of the crews in the switching yard in Spokane.

MR. HANLEY: I object to it on the ground irrelevant, [180] incompetent and immaterial in view of the fact there is an admitted rule that governs the ringing of the bell when the engine is about to move.

JUDGE SCHWELLENBACH: I will sustain the objection in so far as the offer of proof concerns the rule and the interpretation thereof. I am not changing my ruling which I outlined to the jury to the extent if you can bring the knowledge of the custom within the yards to the knowledge of Mr. Owens. That will be admitted upon the matter of your affirmative defenses.

Q. Mr. McCarthy, was there a generally recognized practice followed in the switching yard in Spokane with reference to the ringing of the bell in switching movements? A. Yes, there is.

MR. HANLEY: That is objected to on the same ground, incompetent, irrelevant and immaterial.

JUDGE SCHWELLENBACH: The same ruling. It will be admitted at this time subject to being connected up with Mr. Owens.

Q. What was that practice?

A. In ordinary switching movements the bell is not rung except when crossing over street crossings.

MR. HAMBLEN: I think that's all." (R. 185-187)

It is the petitioner's position that the original question and offer of proof relates solely to interpretation of Rule 30 in the opinion of Mr. McCarthy and the other witnesses mentioned therein. Each witness mentioned therein, namely, Mr. McCarthy (R. 184-187), Mr. Rutherglen (R. 204-205), Mr. Pidcock (R. 195-196), F. H. Lang (R. 209-211), and also some other members of the train crew at the time of the accident to Mr. Owens, gave testimony to the effect that Rule 30 did not apply to switching movements in the yards. The entire evidence on the subject matter was before the jury and it was so recognized by respondent for the reason that respondent requested the court to give its instruction No. 17 which insofar as material is as follows:

"The plaintiff has alleged that defendant railroad company was negligent in violating Rule No. 30 of defendant's rule book requiring that the bell of the engine be rung when the engine is about to move. I instruct you in this connection that if you find from a preponderance of the evidence that said rule did not apply to operations conducted within the confines of defendent's switching yard, then said rule should not be considered further by you in this case." (R. 236).

The court did not give such instruction nor did the respondent except to the failure of the court to

give such instruction. The court did, however, in effect instruct the jury that Rule 30 applied to switch yard operations and respondent took no exception whatsoever to the charge of the Court in this respect. (R. 214-217) This same situation also applies to requested instruction No. 9 of respondent (R. 231), which instruction the court did not give nor did respondent except to the failure of the court to give such instruction.

Federal Rules of Civil Procedure Rule 51 provides in part as follows:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

The Circuit Court of Appeals in dealing with the above rule in its opinion circumvented its provisions by placing what petitioner believes to be the wrong interpretation on the proffered offer of proof by respondent. Such offer of proof does not relate to custom at all. It calls solely for the opinion of witnesses mentioned as to their interpretation of a rule, the construction of which if unambiguous is for the trial judge.

Chicago, R. I. & P. Ry. Co. vs. Ship (1909), 174 Fed. 353.

Great Northern Ry. Co. vs. Hooker, 170 Fed. 154.

Central R. Co. of N. J. vs. Young, 200 Fed. 359.

Louisville R. R. Co. vs. Mitchell (Ky.), 191 S.W. 465.

Gildner vs. Baltimore & O. R. Co. (2d Cir. 1937), 90 Fed. (2d) 635.

Pacheco vs. New York, N. H. & H. R. Co. (2d Cir.), 15 Fed. (2d) 467.

Atchison, T. & S. F. Ry. Co. vs. Ballard (5th Cir. 1940), 108 Fed. (2d) 768. Certiorari denied, 84 L. Ed. 1413, 310 U.S. 646.

The above cases are unanimous in their holding that construction of an unambiguous rule is for the court and not for a jury.

In *Chicago, R. I. & P. Ry. Co. vs. Ship*, 174 Fed. 353. Ship, an engineer on an extra freight train, jumped from his engine just prior to a collision between his train and a box car standing in the yards of defendant, and was injured as a result thereof, and brought action for damages claiming negligence on insufficient head light on engine and failure of the railway company to protect the box car on the main track with proper lights. The rules under which he was operating provided as follows:

> "Yard limits will be indicated by yard limit boards. Within these yard limits, yard engines may occupy main tracks protecting themselves against overdue trains. Extra trains must protect themselves within yard limits."
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> "Trains must be under control when passing through station yards, where engines are employed expecting to find main track occupied."

In reversing judgment for Ship and ordering a new trial the Court held: (quoting from opinion)

> "The facts stated clearly show that Ship violated both of the foregoing rules made for his benefit, and therefore was guilty of negligence which directly contributed to his injuries. The nonobservance of these rules was negligence as a matter of law. Great Northern Ry. Co. v. Hooker (C.C.A.) 170 Fed. 154; Kansas, etc. v. Dye, 70 Fed. 24, 16 C.C.A. 604; St. Louis & S. F. Ry. Co. vs. Dewees, 153 Fed. 56; 82 C.C.A. 190; Missouri K. T. Ry. Co. v. Collier, 157 Fed. 347, 88 C.C.A. 127; Nordquist v. Great Northern Ry. Co., 89 Minn. 485, 95 N.W. 322; Scott v. Eastern Ry. Co., 90 Minn. 135, 95 N.W. 892; Brown v. Northern Pacific Ry. Co., 44 Wash. 1, 86 Pac. 1053. * * *
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> "As in the case of Great Northern Ry. Co. v. Hooker, supra, decided by this court, so in this case, the trial court seemed to leave the interpretation of the rules above mentioned to the jury as a matter of fact. In reference to this practice the language used by Judge Van Devanter in the case last cited, is pertinent.
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> > 'The trial court treated the interpretation of the rules prescribing the plaintiff's duty in the premises as a question of fact to be determined by the jury. But we are of opinion that it was a question of law to be determined by the court. Not only were the rules in the nature of a written instrument, but they contain no terms the meaning of which was not made plain by them; and, this being so, effect should have been given to the general rule that the interpretation of a written instrument rests with the court, and not with the jury (citing cases) * * * And it would seem that by analogy a like holding should be made when the question is one of interpretation.'"

Atchison, T. & S. F. Ry. Co. vs. Ballard, 108 Fed. (2d) 768 (5th Cir. 1940). *Certiorari denied* 84 L. Ed. 1413, 310 U.S. 646. This was an action under the Federal Employers' Liability Act by an engineer for injuries sustained when his train collided with a standing train. Negligence charged was that the fireman of the engineer's train failed to keep a proper lookout. The plaintiff himself was charged with negligence in violating defendant's specific rules, Rule 93 which provided in effect all except first class trains will move within yard limits at restricted speed, the train he was operating being other than a first class train. By Rule D-153 restricted speed was defined as "Proceed, prepared to stop short of train, obstruction or anything that may require the speed of a train to be reduced". There was a judgment for the engineer and the Railroad Company appealed. The judge throughout his charge failed to instruct the jury, as he should have done, that the violation by plaintiff of specific rules such as Rules 93 and D-153 would of itself constitute negligence, and further the charge did not properly advise the jury as to the weight to be attached to the rules, that is, as to their force and effect. (Quoting from the opinion):

> "(2-5) We think appellant is right. It is true, that a violation of company rules for the conduct of its employees, general in terms, will not ordinarily constitute negligence as matter of law. Nor will observance of such rules, as matter of law, necessarily be due care, but it will be for the jury to say, considering the rules along with the

evidence as a whole, whether there was negligence. Gildner v. B. & O. R. Co., 2d Cir., 90 F. (2d) 635; Rocco v. Lehigh Valley R. R. Co., 288 U.S. 275, 53 S. Ct. 343, 77 L. Ed. 743; Miller v. Central R. Co. of New Jersey, 2d Cir., 58 F. (2d) 635; Hall v. Chicago B. & N. R. R., 46 Minn. 439, 49 N.W. 239. *A violation of specific rules though, will constitute negligence just as their observance by others will, in relation to the violator, constitute due* care, Miller v. Central R. Co. of New Jersey, and other cases, supra. Thus, as applied to the question at issue, if the rule for keeping the train at restricted speed had stopped there, without more, it would have left the matter greatly one of judgment and it would be a question of fact under the opinion of witnesses qualified to give opinions, whether in the particular case, there was negligence in failing to observe it. But where as here, there is a precise definition of restricted speed, the question of what the rule means and requires, is a *question of law for the court*, and the evidence of plaintiff himself showing that the train was not proceeding at restricted speed within the definition, it was the duty of the court to say so, and to instruct the jury; that plaintiff was himself negligent in violating the rule of restricted speed; and that if the jury believed that that violation was the sole proximate cause of the injury, they should find a verdict for defendant." * * *

Reversed and remanded.

Considering Assignments of Error 4, 5 and 6, Rule 30 quoted in petition is a specific rule and required no extrinsic evidence to interpret same and the learned trial judge, upon whom devolved the duty of construing the rule, thought so when he stated:

"I feel there is evidence here of negligence on the part of the defendant because of the failure of

its employees to comply with the rule which the defendant company had adopted. Clearly there is a causal connection—if Mr. Owens was relying—if we presume he was taking care for his his own protection and was relying on that rule, and he had a right to rely upon thinking the bell would be rung when the engine was about to move, and the engine was close enough to him so if the bell had been rung he would have heard it, then there certainly is a causal connection between his accident and the failure to ring the bell." (R. 172)

It is therefore petitioner's position that Rule 30 was one of construction for the court and that it was specific in character, and that a violation of such rule constituted negligence per se, and the following decisions are in conflict with the opinion of the court below:

Great Northern Ry. Co. vs. Wiles, 240 U.S. 444, 60 L. Ed. 732.

Frese vs. C. B. & W. R. Co., 263 U.S. 1, 68 L. Ed. 131.

Davis vs. Kennedy, 266 U.S. 147, 69 L. Ed. 212.

Unadilla Valley Ry. Co. vs. Caldine, 278 U.S. 139, 73 L. Ed. 224.

Atchison, T. & S. F. Ry. Co. vs. Ballard (5th Cir. 1940), 108 Fed. (2d) 768. Certiorari denied 84 L. Ed. 1413, 310 U.S. 646.

Gildner vs. Baltimore & O. R. Co. (2nd Cir. 1937), 90 Fed. (2d) 635.

Lehigh Valley R. Co. vs. Mangan, 278 Fed. 85.

Chicago, R. I. & P. Ry. Co. vs. Ship, 174 Fed. 353.

Great Northern Ry. Co. vs. Hooker, 170 Fed. 154.

In the case at bar Rule 30 is a specific rule of appellant's for the operation of its road and yards and, as held in the foregoing authorities, its violation constitutes negligence as a matter of law.

In the case of *Great Northern Ry. Co. vs. Wiles, supra*, negligence charged was pulling out a draw bar of a freight train on which Wiles was employed as flagman. The freight train stopped on the main line on the time of a regular passenger train which was following and had the right of track and which Wiles knew was coming. He did not flag as provided by Rule 99. The Court in denying recovery held Wiles' failure to flag was the sole cause of the collision which resulted in his death.

The *Frese case, supra.* Frese, an engineer primarily in control of his engine, was killed in a collision with another train at a cross-over with a different railroad. Negligence charged was against his fireman who was his subordinate, for not seeing that the track was clear before crossing it. The Court in denying recovery held in effect that it was the personal duty of Frese under the Illinois statute to see that the way was clear before crossing and that negligence could not be attributed to the fireman, who was his subordinate, in the failure of Frese to perform his personal duty even though the fireman may have done more to avoid the collision.

Unadilla Valley Ry. Co. vs. Caldine case, supra. Caldine, conductor, was primarily in command of train 2. He had printed orders to take siding at Bridgewater and let train 15 from the opposite direction which had right of track, pass. Train 2 on Caldine's signal to Dibble, his motorman, left Bridgewater without taking siding and a short distance beyond collision occurred with train 15. Negligence was charged against Dibble, motorman, for obeying Caldine's signal, against station agent Dawson for not informing Caldine and Dibble again that train 2 would take siding at Bridgewater and meet 15. The Court in denying recovery held in effect that Caldine and Dibble were primarily in command and control of train 2 and had a positive meet order with train 15 at Bridgewater which they violated and such violation was the proximate cause of the collision, and that responsibility therefor could not be shifted from one to the other in enforcing liability against the employer, and that the station agent Dawson could not be found contributorily negligent for not informing them to execute an order which they already had knowledge of and were bound to obey.

We have hereinabove in this brief quoted from the Atchison and Chicago, R. I. & P. Ry. Co. vs. Ship cases which hold in effect that violation of a specific rule prescribing safe conduct for the benefit of their employes is negligence per se.

Upon the evidence in this record the rulings of the Court of Appeals complained of is plainly out of accord with the applicable decisions of this Court, some of which are:

Tiller v. Atlantic Coast Line R. Co., 87 L. Ed. 446.

New York Central R. Co. v. Marcone, 281 U.S. 345, 74 L. Ed. 892.

Seago v. New York Central R. Co., 315 U.S. 781, 86 L. Ed. 1188, reversing Seago v. New York Central R. Co., 348 Mo. 761, 155 S.W. (2d) 126.

In *Tiller v. Atlantic Coast Line R. Co.*, supra, 63 Sup. Ct. Rep. 444, 87 L. Ed. 446, decided by this Court on February 1, 1943, the action was one under the Federal Employers' Liability Act to recover for the death of Tiller, who was a policeman for the defendant railroad company. While inspecting, at night, the seals on slowly moving cars on one track, Tiller was struck and killed by a train that was backed on an adjoining track in the yard; the space between the moving cars being three feet seven and one-half inches. There was no eyewitness to the casualty. The automatic bell of the engine backing the train on the adjoining track was ringing. The rear of that train was unlighted, though a brakeman with a lantern was riding on the side away from Tiller. No special signal or warning was given.

The opinion of the Court of Appeals in the instant case is plainly out of accord with this Court's deci-

sion in the Tiller case. In this case the evidence warranted a finding of negligence attributable to the defendant employer as for failure to warn of the impending movement, as did the evidence in the Tiller case—though the evidence of negligence is here more pronounced than in the Tiller case, since it does not appear that in the latter the failure to give a special warning was a violation of a rule.

In *New York Central R. Co. v. Marcone*, 281 U.S. 345, 74 L. Ed. 892, the deceased, whose duty it was to lubricate and service engines in the defendant's roundhouse, was run over and killed by an engine that had been lubricated and serviced and was being removed from the roundhouse by an engine hostler. "There was no eyewitness to the accident" (281 U.S., l. c. 347). The deceased's body was found upon the track after the engine had passed over it. The hostler had sounded the engine whistle, but there was a brief wait thereafter before the fatal movement. There was not a word of testimony as to what the deceased was doing or attempting to do at the precise instant of the casualty. He had no further duty to perform in connection with that particular engine. This Court, in an opinion by Mr. Justice Stone, now Chief Justice, held that the case was one for the jury, and, among other things (281 U.S., l. c. 349, 350), said:

> "Any movement of an engine without warning was dangerous to life and limb. After the hostler mounted the engine, and before it was moved, sufficient time elapsed for the deceased

to come into proximity with it, which was dangerous if, as the jury might have found, he could not be seen from the engine cab by the hostler and was not warned of the impending movement. On the evidence it was for the jury to say whether petitioner exercised due care in moving the engine without a more specific and effective warning and whether failure to give it was the cause of the death."

By the same token, in the instant case the issues of negligence and proximate cause were for the jury. In the instant case, any movement of the engine without warning was dangerous to life and limb. Owens could not be seen from the engine cab by the engineer and was not warned of the impending movement, despite the fact that the rule required such warning. It follows that the decision of the Court of Appeals herein is out of accord with the decision of this Court in the Marcone case.

The Circuit Court of Appeals in its opinion cites the case of Tennant, Admx. vs. Peoria & Pekin Union Ry. Co., L. Ed. Advance Opinions, Vol. 88, p. 322, wherein a similar rule was involved as in the case at bar. The questions presented by this petition are not similar to the questions presented in the Tennant case as in the Tennant case the question before the court was one of proximate cause and while the court also considered the question of negligence, it accepted the record of testimony as it stood and concurred with the court below that there was sufficient proof of negligence.

CONCLUSION

WHEREFORE petitioner prays this Court to grant the writ that her rights under the Federal Employers' Liability Act may be protected.

Respectfully submitted,

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